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IN THE

Supreme Court of the United States

GENERAL PUBLIC UTILITIES CORPORATION, *et al.*,

Petitioners,

v.

FRED N. ABRAMS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

A.H. WILCOX
Counsel of Record
ELLEN KITTREDGE SCOTT
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Attorneys for Petitioners General Public Utilities Corporation, et al.

159739

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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In their Brief in Opposition, Respondents do not disagree with the legal propositions advanced in the Petition. Instead, in a transparent attempt to position this case as nothing but a messy factual dispute not worthy of this Court's attention, Respondents accuse Petitioners of misrepresenting or distorting the record, and of making untrue or misleading statements in their Petition to this Court. As a result, they say, the question presented does not really arise here. Respondents are wrong, in a way that goes to the heart of the question presented.

If it were true that Respondents were never intended to have been, and never were, participants in any of the fact or expert discovery, or the *in limine* proceedings, or the consequent summary judgment proceedings, but nevertheless had judgment entered against them, then a substantial due process concern would arise. But that is not true. In the words of Respondents' own attorneys, at the time they were attempting to persuade the district court to adopt their suggested "test case" approach to trial:

> Plaintiffs' proposed plan establishes the dates by which various pretrial proceedings shall be completed and schedules a trial date. The schedule proposed by plaintiffs provides the parties with fair and adequate time to: conduct both factual and expert discovery in the case; identify the plaintiffs whose claims will be tried in the first trial; narrow the issues by way of filing dispositive motions. . . .

Plaintiffs' Memorandum Regarding Plaintiffs' Case Management Plan, at 1. Since the schedule accompanying the plan contemplated that much of the time allotted for discovery would occur *before* the "test cases" for trial were even selected, perforce that discovery was not limited to discovery by or against only the plaintiffs selected for the initial trial.

That same Memorandum Regarding Plaintiffs' Case Management Plan also reflected the understanding of Respondents' attorneys that the cases were not consolidated solely for "administrative purposes," as they now assert, but rather for pretrial proceedings, as the Petition asserts. Respondents' attorneys there wrote (at 3):

> Plaintiffs understand that the reason why *this Court consolidated the instant cases for coordinated pretrial proceedings* was to establish a mechanism by which a fair resolution *of all these cases* can be reached in an expeditious manner.

(Emphasis added.) Plainly, Respondents understood, through their counsel, that the cases were consolidated for pretrial proceedings, and that pretrial proceedings included both fact and expert discovery, as well as potential dispositive motions.

Moreover, if Respondents were correct that nothing was to happen that might affect the rights of anyone other than the ten test case plaintiffs, one must wonder why they did not object on that basis when Petitioners, as defendants below, pursued summary judgment against other plaintiffs based on the statute of limitations;[1] when Petitioners, as defendants below, pursued summary judgment against all plaintiffs based on a federal preemption argument;[2] or when Petitioners, as defendants below, pursued partial summary judgment as to the punitive damage claims of all plaintiffs.[3] Completely consistent with

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1. *See In re TMI*, 89 F.3d 1106 (3d Cir. 1996).

2. *See In re TMI*, 67 F.3d 1103 (3d Cir. 1995).

3. *See In re TMI*, 67 F.3d 1119 (3d Cir. 1995).

this history of consolidated activity, Petitioners, as defendants below, filed the motion for summary judgment directed against all plaintiffs, as soon as the *Daubert in limine* process (also directed against all plaintiffs) deprived all plaintiffs of the expert testimony proffered on their behalf, and essential to their claims.

Respondents attempt to evade the force of the Petition's soundness in other ways, equally mistaken. For example, they raise the false dichotomy that the proceedings below were either consolidated for all purposes, including trial, or for none. *Cf.* Brief in Opposition at 5. Since Petitioners agree that the cases were not consolidated for trial, *id.*, Respondents conclude that the cases could not have been consolidated for any "substantive" purposes, such as binding pretrial proceedings. That argument, however, represents the logical fallacy of the excluded middle. It is obviously possible (and common) that cases might be consolidated for pretrial proceedings, but not for trial.

Respondents also assert that under their trial plan, which the district court adopted, there was to be not just a bellwether trial, but "bellwether litigation" in which all proceedings were stayed as to everyone else. Brief in Opposition at 6. This characterization of events is belied by the fact that the order adopting the test case approach for trial said that a designated number of plaintiffs were to be selected "for an initial trial." That same order, however, also established a schedule for the completion of "all fact discovery" and "all expert discovery," and this portion of the order was expressly said by the district court to be applicable to "All Plaintiffs." Moreover, nothing in that (or any other) order stayed proceedings as to all plaintiffs other than the test case plaintiffs. Thus when Respondents assert that "the claims of the remaining 2000 plaintiffs [were]

essentially stayed pending the outcome of the bellwether cases", it is they who do not accurately portray what occurred in the district court.

At page 6 of the Brief in Opposition, Respondents contend:

> During the course of all of the pretrial proceedings, no suggestion was ever made by Petitioners that the administrative consolidation of the cases in fact affected [*sic*] a substantive consolidation that would affect the rights of the non-bellwether plaintiffs.

But the very same stipulation and order which effected the "administrative consolidation" (as Respondents like to call it)[4] is also the one which continued the procedure for using the captioning process to designate whether a pleading related to "All Plaintiffs" or only some subset of plaintiffs. And that procedure was used time and time again to affect the substantive "rights of the non-bellwether plaintiffs." As just noted, that procedure was used in connection with a summary judgment motion based on the statute of limitations and directed against 42 "non-bellwether" plaintiffs (which was granted), a summary judgment motion directed against all plaintiffs based on federal preemption of the standard of care (which was granted in part and denied in part), and a partial summary judgment motion directed against all plaintiffs relating to their claim for punitive damages (which was denied). Throughout this litigation, then, all of the plaintiffs in the consolidated cases knew they were

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4. Respondents never explain what limited function they understood the "administrative consolidation" to have served. Nor do they ever challenge the accuracy of Petitioners' recitation that at the time of the stipulation and order consolidating all the cases into one civil action, the then pending cases had already been consolidated for the purpose of pretrial proceedings.

"at risk" of being a target of pretrial proceedings which might affect their "substantive rights." Respondents' claim to the contrary is contradicted by years of proceedings, both in the trial court and the Court of Appeals.

In another egregious statement, the Brief in Opposition asserts (without furnishing any specifics or authority) that the captioning process *agreed to by the parties in a stipulation approved by the district court* cannot be invoked against Respondents because:

> In any event, substantive rights cannot be extinguished by a form over substance argument that works to the severe detriment to the substantive rights of the non-bellwether plaintiffs.

Brief in Opposition at 14. This can only be interpreted to mean that even though their counsel stipulated that the captioning procedure was to be the method by which the parties were to signal to each other whether a pleading (such as a summary judgment motion, for example) related to all plaintiffs or just a few plaintiffs, it is impermissible to use that agreed procedure that way if "substantive rights" might be affected. In other words, contrary to the rule that parties are bound by the acts and omissions of their legal representatives, Respondents assert that the rule cannot apply to *their* detriment.

But parties *are* bound by the acts of their counsel. As this Court said in a closely related context: "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of his freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation." *Pioneer Investment Services Co. v. Brunswick Associates, Ltd.*, 507 U.S. 380, 397; 113 S. Ct. 1489, 1499 (1993). Here, when

Respondents' counsel submitted the mandatory expert disclosures, they designated them as applying to "All Plaintiffs," not just ten "test case" or "bellwether" plaintiffs. It was those expert disclosures which set out the experts' theories on plaintiffs' radiation exposures, doses, and causation. Thus the Brief in Opposition is completely wrong when it asserts (at p. 15) that the "non-bellwether plaintiffs never acknowledged a minimum 10 rem threshold dose theory. . . ." That was precisely the theory advanced by a medical expert proffered on behalf of all plaintiffs.

Last, in closing their Statement of the Case, Respondents write:

> [I]n opposing [Petitioners'] request for summary judgment, they [the non-bellwether plaintiffs] presented evidence that established the existence of other legal and scientific theories that would permit their cases to be litigated irrespective of the exclusion of certain expert evidence proffered by the 10 bellwether plaintiffs. For example, the non-bellwether plaintiffs presented evidence that the scientific community recognizes that there is no safe threshold for exposure to radiation and the resulting induction of cancer.

Brief in Opposition at 16-17. But the "evidence" they refer to was evidence proffered as Exhibit 118 at the *in limine* hearings on the admissibility of plaintiffs' medical experts on causation. Thus, contrary to the claims elsewhere in the Brief in Opposition, here Respondents acknowledge that they *were participants in* the *in limine* process, *that they presented evidence* in those hearings, and that they *were participants in* the summary judgment process, opposing that motion with their own "legal and scientific theories."

In this context, it is simply incomprehensible how the Court of Appeals concluded that the Seventh Amendment required, in addition to service on Respondents' counsel of all the motion papers, that Respondents also had to supply a "positive manifestation of agreement" to be bound by the results of the *in limine* and summary judgment proceedings, before the district court could enter summary judgment against them. The question stated in the Petition is exactly the question presented in this case, and should be reviewed by this Court for exactly the reasons stated in the Petition. There is too much opportunity for mischief and inefficiency if the Court of Appeals' decision stands.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

A.H. WILCOX
Counsel of Record
ELLEN KITTREDGE SCOTT
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103
(215) 981-4000

Attorneys for Petitioners
General Public Utilities
Corporation, et al.